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**In the Supreme Court of the**

**John F. Davis, Clerk**

**United States**

**OCTOBER TERM, 1967**

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**No. 465**

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**ELISHA EDWARDS,**

*Petitioner,*

**VS.**

**PACIFIC FRUIT EXPRESS COMPANY,**

*Respondent.*

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**On Writ of Certiorari to the United States Court of  
Appeals for the Ninth Circuit**

**Brief for the Respondent**

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## SUBJECT INDEX

	Page
Question Presented .....	1
Statement of the Case.....	1
Summary of Argument.....	3
Argument .....	5
I. All Courts Which Have Considered the Precise Question Presented to This Court Have Held Refrigerator Car Companies Are Not Subject to the Federal Employers' Liability Act .....	5
II. Both in the 1908 Enactment and the 1939 Amendment Congress Did Not Intend to Include Refrigerator Car Companies Within the Coverage of the Federal Employers' Liability Act .....	8
III. There Are No Policy Considerations Favoring Extension of the FELA to New Industries.....	16
IV. The Facts of This Case Establish as a Matter of Law That Pacific Fruit Express Is Not a "Common Carrier by Railroad" .....	27
Conclusion—This Case Was Properly Resolved by Summary Judgment .....	33

# TABLE OF AUTHORITIES CITED

CASES	Pages
Aguirre v. Southern Pac. Co., 232 Cal.App.2d 636; 43 Cal. Rptr. 73 (1965).....	7
Bailey v. Central Vermont Railway, 319 U.S. 350 (1943).....	22
Central Commercial Co. v. Louisville & Nashville R.R. Co., 27 I.C.C. 114 (1913).....	28
Duffy v. Armco Steel Corporation, 225 F.Supp. 737 (W.D. Pa. 1964) .....	25
Ellis v. Interstate Commerce Commission, 237 U.S. 434 (1915) 14, 32 Employers' Liability Cases, 207 U.S. 463 (1908).....	8
Fort Street Union Depot v. Hillen, 119 F.2d 307 (6th Cir. 1941) .....	32
Gaulden v. Southern Pacific Co., 174 F.2d 1022 (9th Cir. 1949) .....	6
Harris v. Pennsylvania Railroad, 361 U.S. 15 (1959).....	20
Hetman v. Fruit Growers Express Co., 346 F.2d 947 (3rd Cir. 1965) .....	7
International Stevedoring Company v. Haverty, 272 U.S. 50 (1926) .....	23
Jones v. New York Cent. R. Co., 182 F.2d 326 (6th Cir. 1950) .....	11
Kelly v. General Electric Co., 110 F.Supp. 4 (E.D. Pa. 1953) afd. 204 F.2d 692 (3rd Cir.) cert. den'd, 346 U.S. 886.....	24, 25
Latsko v. National Carloading Corp., 192 F.2d 905 (6th Cir. 1951) .....	11
Lone Star Steel Co. v. McGee, 380 F.2d 640 (5th Cir. 1967), cert. den'd ..... U.S. .... (1967).....	26
Moleton v. Union Pac. R.R. Co., 118 Ut. 107, 219 P.2d 1080, (1950), cert. den'd; 340 U.S. 932.....	7

# TABLE OF AUTHORITIES CITED

iii

## Pages

New York Central R. R. Co. v. Winfield, 244 U.S. 147 (1916)	6
Parden v. Terminal R. of Alabama, 377 U.S. 184 (1964).....	30
RR Retirement Board v. Alton R.R., 295 U.S. 330 (1935).....	15
Reed v. Pennsylvania R.R., 351 U.S. 502 (1956).....	14, 26
Robinson v. Baltimore & Ohio R.R., 237 U.S. 84.....	9
Second Employers' Liability Cases, 223 U.S. 1 (1912).....	9
Tilson v. Ford Motor Company, 130 F.Supp. 676 (E.D. Mich. 1955) .....	24, 25
Union Stock Yard Co. v. U.S., 308 U.S. 213 (1939).....	32
U.S. v. Brooklyn Terminal, 249 U.S. 296 (1919).....	31
U.S. ex rel. Chicago etc. Refrigerator Co. v. I.C.C., 265 U.S. 292 (1924) .....	15
U.S. v. Fruit Growers Express, 279 U.S. 363 (1929).....	7, 14
Wells Fargo & Co. v. Taylor, 254 U.S. 175.....	10, 11
Wilkerson v. McCarthy, 336 U.S. 53 (1948).....	20, 22, 33

## STATUTES

California Code of Civil Procedure, Section 2015.5.....	3
California Labor Code:	
§ 139.5 .....	21
§ 4600 .....	19
§ 4650 .....	20
§ 4658 .....	19
§ 5410 .....	20
Federal Employees Compensation Act, 63 Stat. 862, 5 U.S.C., Section 8104 (1949) and 80 Stat. 539 (1966) 81 Stat. 210, 5 U.S.C. Section 8111 (1967).....	21
Federal Employers' Liability Act, 35 Stat. 65, 45 U.S.C. Section 51 et seq.....	2, 9

	Pages
Interstate Commerce Act, 24 Stat. 379, 49 U.S.C. Section 1, et seq. ....	14
Internal Revenue Code of 1954, Section 3231 et seq. ....	15
Jones Act, 41 Stat. 1007, 46 U.S.C., Section 688 (1920) .....	23
Railway Labor Act, 48 Stat. 1185 (1934), 45 U.S.C., Section 151 .....	15
The Carriers' Taxing Act, 49 Stat. 974 (1935) .....	15
The Defense Bases Act, 55 Stat. 622, 42 U.S.C., Section 1651, et seq., as amended (1941) .....	23
The Longshoremen's & Harbor Workers Compensation Act, 44 Stat. 1424, 33 U.S.C., Section 901, et seq. (1927) .....	23
The Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C., Section 1331, et seq., (1953) .....	23
The Railroad Retirement Act of 1934, 48 Stat. 1283 .....	15
The Railroad Retirement Act (1935), 49 Stat. 967 (1935) .....	15
The Railroad Retirement Act of 1937, 50 Stat. 307, 45 U.S.C. Section 228a et seq. (1937) .....	15
The Railroad Retirement Tax Act, 50 Stat. 435 (1937) .....	15
The Railroad Unemployment Insurance Act, 52 Stat. 1094, 45 U.S.C., Section 351 et seq. (1938) .....	15
Transportation Act of 1940, 54 Stat. 917, 49 U.S.C. Section 20(g) .....	14
5 U.S.C.:	
§ 792 .....	24
§ 8101(1)(D) .....	23
§ 8140 .....	23
§ 8142 .....	23
§ 8143 .....	23
§ 8143(a) .....	23
§ 8143a .....	23
§ 8146 .....	24

# TABLE OF AUTHORITIES CITED

v

TEXTS	Pages
24 Am. Lab. Leg. Rev. 161 (1934).....	17
Miller, The Quest for a Federal Workmen's Compensation Law for Railroad Employees, 18 Law and Contemporary Problems 188 .....	19
Parker, FELA or Uniform Compensation for All Workers, 18 Law and Contemporary Problems, 208.....	27
Pollack, The Crisis in Work Injury Compensation On and Off the Railroads, 18 Law and Contemporary Problems, 296. (1953) .....	19
Pollack, Workmen's Compensation for Railroad Work Injuries and Diseases, 36 Cornell Law Review 236 at 262.....	19, 20
The Railway Clerk, official organ of the Brotherhood, Vol. 38, p. 329 (1939) .....	18

## OTHER AUTHORITIES

40 pt. 5 Cong. Rec. 4601 (1906) Liability of Employers.....	8
40 pt. 5 Cong. Rec. 7658 and 7916 (1906) Employers' Liability Bill .....	8
62nd Cong. 2d. Sess. S. Bill No. 6121, H.R. Bill No. 20487.....	17
Hearings Before and Subcommittee of the Senate Committee on the Judiciary on Amending the Federal Employers' Lia- bility Act, 76th Cong. 1st Sess., p. 57 (1939).....	13
H. R. Rep. No. 1386, 60th Cong. 1st Sess.....	9
Senate Bill 1708 (76th Cong. 1st Sess., 1939).....	10
Senate Committee on the Judiciary, Amending the Employers' Liability Act, S. Rep. No. 661, 76th Cong., 1st Sess.....	14
Sen. Doc. No. 338, 62nd Cong., 2d Sess. (1912).....	17
The Official Railway Equipment Register, Vol. LXXXII No. 4, April 1967, I.C.C. R.E.R. No. 363.....	26

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On Writ of Certiorari to the United States Court of  
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## Brief for the Respondent

### QUESTION PRESENTED

Does the Federal Employers' Liability Act extend to refrigerator car companies?

### STATEMENT OF THE CASE

This action originated by complaint in the United States District Court for the Northern District of California alleging personal injuries sustained by petitioner (hereinafter

called plaintiff) in November of 1963, in the course of his employment at Roseville, California. (A.2) The Complaint further alleges that respondent, Pacific Fruit Express Company (hereinafter called PFE) is a common carrier by railroad and subject to the Federal Employers' Liability Act (35 Stat. 65, 45 U.S.C. Section 51 et seq., hereafter sometimes referred to as FELA). (A.1) An answer was filed admitting employment and injury in the course of employment (A.5), and denying PFE's status as a common carrier by railroad. (A.5) The answer affirmatively shows PFE furnished Workmen's Compensation benefits to plaintiff pursuant to California law. (A.6, 7)

Shortly after filing its answer, PFE moved for summary judgment on the ground that it was not a common carrier by railroad and not subject to the Federal Employers' Liability Act. (A.8) The motion was supported by an affidavit of W. G. Cranmer, Assistant to the Vice-President and General Manager of PFE. (A.18) The affidavit states the PFE is a refrigerator car company. (A.18) The affidavit shows that PFE has two primary functions: (1) It owns and rents a large fleet of insulated railroad cars, known as refrigerator cars, suitable for the carriage of perishable commodities and (2) it furnishes icing and heating protective services to these cars. (A.18) The affidavit also shows that PFE has a main shop and ice plant at Roseville, California, where the plaintiff was injured, that it owns only shop tracks and loading tracks at various locations, and that it owns two shops switch engines, one located at Roseville the other at Tucson, Arizona. (A.21) The affidavit shows that plaintiff was an iceman whose primary duties have to do with moving ice from one location to another, operating conveyors, loading ice in the bodies of refrigerator cars, refueling mechanical cars and other miscellaneous protective service work. (A.22)

In opposition to the motion for summary judgment, plaintiff submitted a declaration<sup>1</sup> of an investigator for plaintiff's attorneys. The investigator states he called at the offices of PFE in San Francisco and obtained certain literature which he attached to his declaration. (A.36) The literature so obtained describes in more detail the types and construction of refrigerator cars, the nature of the refrigerator car industry and reiterates and amplifies the matters set forth in the affidavit of Cranmer. (A.41, 43) In the course of this general description the literature adds the following matters on which plaintiff seeks to rely: (1) That PFE owns a total of five shops (A.43); (2) That PFE operates 11 ice plants (A.43); (3) That PFE furnishes "diversion" and "passing" services and (4) PFE has offices and agencies in all principal Western produce areas and in principal cities. (A.40)

In addition to the foregoing, plaintiff seeks to rely on the extra record fact that in the classified telephone directories of various cities PFE is listed under the categories of "Railroads" and "Railroad Companies."

The honorable Albert Wollenberg, Judge of the District Court, granted PFE's motion for summary judgment on the ground that PFE was not a common carrier by railroad. (A.51). Plaintiff appealed to the Court of Appeals for the Ninth Circuit. That Court affirmed the summary judgment. (A.53)

### **SUMMARY OF ARGUMENT**

A refrigerator car company such as the respondent is not a "common carrier by railroad" as defined in Federal

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1. California Law, California Code of Civil Procedure, Section 2015.5 permits a statement to be verified by stating that it is made "under penalty of perjury." Such statements are usually called declarations. The procedure appears not to be available in Federal Courts.

Employers' Liability Act. A "common carrier by railroad" for purposes of the Act is just what the term implies—a carrier for the public engaged in the business of physically operating and moving trains of cars over rails by means of locomotive power. No amount of sophistry can convert a company which supplies refrigerator cars into an operational railroad.

The decision of every court which has had to decide the status of a refrigerator car company in terms of the Federal Employers' Liability Act has been the same. On each and every occasion the decision has been that such companies are not railroads within the meaning of the Act.

The intent of Congress as to the meaning of "common carrier by railroad" is clear. The words were used to answer a criticism of this Court set forth in the *Employers Liability Cases* of 1907, (*infra*). Subsequent to the passage of the present Act in 1908, and before its 1939 amendment this Court made clear in its decisions that refrigerator car companies are something different than a "common carrier by railroad." With full knowledge of this Court's holdings that refrigerator car companies and railroads are different in nature and should be treated differently under law unless there is a specific statutory directive to the contrary, Congress chose not to include refrigerator car companies within the Act in its 1939 amendment. This choice of Congress came after it had, within the preceding five years, passed a series of laws involving railroads which specifically included refrigerator car companies. Thus, the words of the Act itself, the knowledge Congress had of this Court's actions and the acts of Congress all point to one conclusion and that is that a company engaged in supplying refrigerator cars is not subject to the Act.

There is no reason to try to extend the Act's coverage to areas not intended by Congress. The Act is hostile to

the interests of the employee, employer and their relationship to one another. It is out of step with the needs of a modern mechanized society. It is an anachronism which does not fulfill the social and economic needs of our time. The normal historical development of work injury remedies has moved from harsh common law concepts of negligence with all its many defenses such as contributory negligence, assumption of the risk and the fellow servant doctrine to a modified negligence statute or employer liability act such as the FELA and finally to the more modern and enlightened concept of workmen's compensation. The FELA is a bad law which has in large measure continued to exist because of the influence of vested interests which have made a profit from it at the unjustifiable expense of injured employees coming within its provisions.

A reversal by this Court of the judgments of the Court of Appeals and the District Court would deprive the thousands of employees of the respondent of substantial rights enjoyed under workmen's compensation statutes. The decisions below are correct. It would not be proper to make the status of "common carrier by railroad" under the FELA a question of fact. If that were the case, employees of the respondent as well as the respondent would be uncertain in each case as to the coverage for each accident and as a result almost every case would have to be litigated to allow a fact finder to determine which law should be applied.

The judgment below should be affirmed.

#### **ARGUMENT**

- I. All Courts Which Have Considered the Precise Question Presented to This Court Have Held Refrigerator Car Companies Are Not Subject to the Federal Employers' Liability Act.**

This is a suit against PFE alone and neither Southern Pacific Company, Union Pacific Railroad Company, (own-

ers of the PFE), nor any other railroad company is named as a defendant. It is conceded plaintiff was the employee of PFE at the time of his injury. No issues are tendered which are dependent on the nature of plaintiff's activity at the moment of his accident, nor on theories of alter ego or borrowed servant. (Brief for the Petitioner, page 21).

The only issue is as to the scope of the Act, that is, whether the FELA should be extended to refrigerator car companies. The resolution of the question will determine whether employees of that industry and other industries will in the future for their work connected injuries be covered by a system of workmen's compensation (in plaintiff's case, that of California) or a modified negligence statute (FELA). The mutual exclusiveness of the two systems is the result of the holding of this Court in *New York Central R. R. Co. v. Winfield*, 244 U.S. 147 (1916).

The question tendered has been considered by the Ninth and Third Circuits and by the state courts of California and Utah. Each decision has been against the position advanced by plaintiff in this case. In *Gaulden v. Southern Pacific Co.*, 174 F.2d 1022 (9th Cir. 1949) affirming judgment of District Court 78 F.Supp. 651 (N. D. Calif. 1948) plaintiff, an iceman sought to maintain an action under the Federal Employers' Liability Act against both his employer, PFE, and Southern Pacific Company. The accident happened at the icing yard and plant owned and operated by PFE at Bakersfield, California. The District Court gave substantial consideration to whether PFE was a common carrier by railroad within the meaning of the FELA. The Court concluded PFE was not such a carrier by railroad. Judgment was affirmed by the Court of Appeals on the grounds and for the reasons stated in the opinion of the District Court. The opinion of the District Court in this case is so well considered that it has been cited and quoted

extensively in every subsequent case dealing with the subject.

In *Hetman v. Fruit Growers Express Co.*, 346 F.2d 947 (3rd Cir. 1965) there was involved a decedent who was an employee of an independent contractor performing icing services for the defendant refrigerator car company. One of the questions raised was whether the defendant was "a common carrier by railroad." The Court answered, no, and affirmed the action of the trial court in granting summary judgment for the defendant.<sup>2</sup>

*Aguirre v. Southern Pac. Co.*, 232 Cal.App.2d 636; 43 Cal. Rptr. 73 (1965) involved a summary judgment affirmed on appeal. The plaintiff was an employee of PFE at Roseville, California. The Court gave express consideration to whether PFE was a common carrier by railroad (p. 643) and on the basis of its own consideration of the authorities concluded it was not.

*Moletton v. Union Pac. R.R. Co.*, 118 Ut. 107, 219 P.2d 1080, (1950) cert. den'd; 340 U.S. 932 was a case which was dismissed by the trial court on a non-suit and affirmed on appeal. Plaintiff was an employee of PFE at Laramie, Wyoming, but working in the yards of Union Pacific Railroad Company. The Court held PFE was not a common carrier by railroad within the meaning of the Federal Employers' Liability Act.

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2. In footnote 7, p. 8 of Petitioner's Brief, plaintiff seeks to factually distinguish the operations of Fruit Growers Express from those of PFE on the ground that "it simply leases cars while an independently contracted company ices and otherwise services the railroad cars." Interestingly enough, before the District Court, on the authority of *U.S. v. Fruit Growers Express*, 279 U.S. 363 (1929), plaintiff took the opposite position when he stated, "It is to be noted that the nature of Fruit Growers Express was considerably different than PFE. The so-called protective services is all that Fruit Growers provided . . . They did not own cars or tracks as does PFE." (A. 28, 29).

**II. Both in the 1908 Enactment and the 1939 Amendment Congress Did Not Intend to Include Refrigerator Car Companies Within the Coverage of the Federal Employers' Liability Act.**

At the time of the enactment of the Employers' Liability Act of 1906, and the enactment of the present Act in 1908, there existed a number of activities and facilities which, while used in conjunction with railroads and closely related to railroading, were yet not railroading itself. Sleeping car companies, private car lines of various sorts, express companies, various communication facilities, ferries and bridges were examples of these sorts of activities and facilities.

The first Employers' Liability Act, 34 Stat. 232 included within its coverage "every common carrier engaged in trade or commerce . . ." between the states. It was not on its face confined to common carriers by railroad. In construing the scope of the statute in the *Employers' Liability Cases*, 207 U.S. 463, (1908) the opinion of this Court noted:

"From the first section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridges, wagon lines, carriages, trolley lines, etc." (P. 497)

The Act was held unconstitutional.

The national discussion preceding enactment of the first Act, however, had been carried on in terms of accidents befalling the operating employees of railroad common carriers. See, for example, the Congressional debates: 40 pt. 5 Cong. Rec. 4601 (1906) Liability of Employers; 40 pt. 8 Cong. Rec. 7658 and 7916 (1906) Employers' Liability Bill.

Congress in passing the present Act in 1908, clarified the matter of scope of coverage. The Act as passed was

confined to common carriers by railroad," 35 Stat. 65; 45 U.S.C. Section 51, et seq. Congress, of course, was well aware of the objections found by this Court to the constitutionality of the first Act. The report on the 1908 bill in the House of Representatives prints in full the Opinion and Dissenting Opinions of this Court in the Employers' Liability Cases, H. R. Rep. No. 1386, 60th Cong. 1st Sess. Congress thus carefully confined the scope of the Act to common carriers by railroad. It did not extend it to other common carriers or other activities or facilities related to railroading. The purpose of the Act—the mischief to be checked—"relates to common carriers by railroad" and "is to change the common-law liability of employers... for personal injuries received by employees in the service." H. R. Rep. No. 1386, 60th Cong. 1st Sess. (1908) p. 1.

In the *Second Employers' Liability Cases*, 223 U.S. 1 (1912) this Court passed on the constitutionality of the present Act. At page 52 it was stated:

"Coming to the question of classification, it is true that the liability which the act creates is imposed only on interstate carriers by railroad, although there are other interstate carriers, and is imposed for the benefit of all employes of such carriers by railroad who are employed in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains or to hazards that differ from those to which other employes in such commerce, not within the act, are exposed."

In 1915, in *Robinson v. Baltimore & Ohio R.R.*, 237 U.S. 84 this Court held that a Pullman car porter was not an employee of a railroad, hence, not within coverage of the Act. The Court stated at page 94, "It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with

this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act."

In 1920, in *Wells Fargo & Co. v. Taylor*, 254 U.S. 175, this Court held that express companies were not within the coverage of the Act. At pages 186 and 187 the Court stated:

"In our opinion the words 'common carrier by railroad,' as used in the act, mean one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptance of the words, but is enforced by the mention of cars, engines, track, roadbed and other property pertaining to a going railroad (see *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 212-213); by the obvious reference in the latter part of Sections 3 and 4 to statutes requiring engines and cars to be equipped with automatic couplers, standard drawbars and other appliances intended to promote the safety of railroad employees (see *San Antonio & Aransas Pass Ry. Co. v. Wagner*, 241 U.S. 476, 484); by the use of similar words in closely related acts which apply only to carriers operating railroads, c. 196, 27 Stat. 531; c. 225, 35 Stat. 476; c. 208, 36 Stat. 350, and by the fact that similar words in the original Interstate Commerce Act had been construed as including carriers operating railroads but not express companies doing business as here shown, 1 I.C.C. 349; *United States v. Morsman*, 42 Fed. Rep. 448; *Southern Indiana Express Co. v. United States Express Co.*, 88 Fed. Rep. 659, 662; s. c. 92 Fed. Rep. 1022. And see *American Express Co. v. United States*, 212 U.S. 522, 531, 534."

In 1939, Congress substantially amended the Act, 53 Stat. 1404. One of the proposed amendments was Senate Bill 1708 (76th Cong. 1st Sess., 1939). This bill would have

amended Section 1 of the Act to read, "Every common carrier by railroad, including every express company, freight-forwarding company, and sleeping-car company, engaged in commerce . . ." Such a proposal was, of course, in the face of the Court's construction of the Act to exclude employees of sleeping-car companies and express companies. It is noteworthy also that the proposed bill included another peripheral activity-as to which the courts had not spoken—that of freight-forwarding.<sup>3</sup> Hearings were held before a sub-committee of the Committee on the Judiciary of the Senate commencing Tuesday, March 28, 1939. Representatives of Railway Express Agency and Pullman Co., spoke against the proposed extension of the scope of the Act, but no one could be found to speak in favor of it. The following colloquy ensued between Senator Neely, Mr. Wilson, representing Railway Express Agency, Mr. Williston representing the Pullman Company, and Mr. McGrath, general Counsel of the Brotherhood of Railway Trainmen:

"SENATOR NEELY. Mr. Wilson, are you authorized to speak for the employees of the express company, or just the corporation?

MR. WILSON. I am authorized to speak only for the company, but yesterday a representative of one of the unions told me I might speak for him. Over the telephone the other day I talked to Mr. Harrison, the head of the Brotherhood of Railway Clerks, perhaps the largest union in connection with our type of work. He

3. For a case holding freight forwarders not subject to FELA see *Latsko v. National Carloading Corp.*, 192 F.2d 905 (6th Cir. 1951). The court arrives at the result on the basis of the text of the act and various decisions cited in this brief. No mention is made in the opinion of the statutory history of exclusion of freight forwarders from the 1939 amendment.

*Jones v. New York Cent. R. Co.*, 182 F.2d 326 (6th Cir. 1950) arrives at the same result for express companies, largely on the authority of *Well Fargo & Co. v. Taylor*, 254 U.S. 175. Again no mention is made of the statutory history of the 1939 amendment.

indicated to me over the telephone that I might say something for him.

SENATOR NEELY. Does Mr. Harrison join in your suggestion that the express companies be eliminated from the act?

MR. WILSON. Both Mr. Harrison and Mr. O'Brien, the latter representing the International Brotherhood of Teamsters, Chauffeurs and Helpers. Mr. O'Brien stated very definitely that he was very much opposed to the inclusion of express companies.

SENATOR NEELY. May I inquire of the attorney for the Pullman Co. whether the representatives of the employees of that company join the representative of the corporation in asking to be excluded from the operation of this bill?

MR. WILLISTON. No. We have not heard from them. They have never objected to the manner of our operation.

SENATOR NEELY. At whose request were the express companies and the Pullman Co. included in the proposed legislation?

MR. McGRATH. Maybe I can throw a little light on that question. I think it was in 1932 that the Railway Labor Executives Association endorsed an amendment such as this. At that time the Harrison organization—I am not sure about Mr. O'Brien, because his organization is not affiliated with the Railway Labor Executives Association—was in favor of incorporating express-company employees. I presume the Pullman employees got in likewise. I am not sure, but apparently they have abandoned that position, perhaps on further information. The representative of the teamsters was here yesterday. He referred to his affiliation with the American Federation of Labor, and said that he might be opposed to certain features of the bill. In discussion with him later he indicated that they did not want to have the teamsters brought under the act. That is as much information as I can give you on the subject.

SENATOR NEELY. The subcommittee will take a recess until 2 o'clock. (Whereupon, at 12 o'clock noon, a recess was taken until 2 p.m.)

### AFTER RECESS

At the expiration of the recess the hearing was resumed.

SENATOR NEELY. I just had a telephone conversation with Mr. Backus, who spoke for Mr. Harrison, of the Brotherhood of Railway Clerks. He stated that Mr. Harrison's organization does not desire to be included in the bill.

Mr. McGrath, do you know of any reason why the express companies should not be stricken from the bill?

MR. McGRATH. No; I don't.

SENATOR NEELY. Mr. Backus informs me that the American Federation of Labor, with which the railroad brotherhoods are identified, is not interested in having the Pullman employees included in the bill. In view of all which, let me suggest that the Pullman Co. and the express companies be excluded.

SENATOR AUSTIN. I have no objection. What about the freight-forwarding companies?

SENATOR NEELY. I have no information on that point. But unless Mr. Rivinus, the general counsel who spoke so eloquently for the Norfolk & Western, or some other interested person objects, we shall eliminate the Pullman Co. employees and express-company employees by unanimous consent." Hearings Before and Subcommittee of the Senate Committee on the Judiciary on Amending the Federal Employers' Liability Act, 76th Cong. 1st Sess. pp. 57, 58 (1939).

The report in the Senate on the bill which ultimately passed states, "The bill as introduced was intended to broaden the application of the act to include express, freight forwarding and sleeping-car companies. Upon the hearings it was clearly shown that there is neither neces-

sity nor demand for the inclusion of these companies in the act. Therefore, they have been excluded from the substitute." Senate Committee on the Judiciary, Amending the Employers' Liability Act, S. Rep. No. 661, 76th Cong., 1st Sess.

The significance of this is plain. By the 1939 amendments Congress certainly expanded the coverage of the Act in one direction—the term "person . . . employed" was broadened to include any employee "any part" of whose duties is in furtherance of or substantially affects interstate commerce. Thus were ended the "fine distinctions as to coverage between employees." *Reed v. Pennsylvania R.R.*, 351 U.S. 502 at 505 (1956). The test of employment by a common carrier by railroad was not abolished however. And specific consideration was given to broadening the scope of the Act to include employees in closely related industries. But this was turned down. Congress declined to expand the scope of the Act so as to extend it to activities and facilities intimately associated with the business of common carrier by railroad.

Congress did not lack knowledge of the existence or nature of refrigerator car companies. To begin with, this Court had twice spoken that refrigerator car companies were not common carriers by railroad and thus the sorts of entities subject to regulation under the Interstate Commerce Act, 24 Stat. 379, 49 U.S.C. Section 1, et seq., as amended, with its concept of carrier by railroad. *Ellis v. Interstate Commerce Commission*, 237 U.S. 434 (1915); *U. S. v. Fruit Growers Express*, 279 U.S. 363 (1929).<sup>4</sup> In

4. The year following the 1939 FELA amendments Congress added Section 20 (6) to the Interstate Commerce Act specifically giving the Commission a limited jurisdiction over companies which "furnish cars or protective service against heat or cold." Transportation Act of 1940, 54 Stat. 917, 49 U.S.C. Section 20 (6).

1924, it had also ruled in U.S. ex rel. *Chicago etc. Refrigerator Co. v. I.C.C.*, 265 U.S. 292 (1924) that such companies were not common carriers by railroad within the meaning of the Transportation Act of 1920.

Of paramount significance, however, in considering Congress' knowledge as to refrigerator car companies, is the fact that in the decade of the 1930's Congress passed the following Acts which specifically extend coverage to "any company . . . which operates any equipment or facilities or performs any service . . . in connection with . . . refrigeration or icing . . . of property transported by railroad . . ."

(1) An amendment to the Railway Labor Act, 48 Stat. 1185 (1934), 45 U.S.C., Section 151. The Act as originally passed, 44 Stat. 577 (1926) did not specifically include refrigerator car companies. Congress amended it to do so.

(2) The Railroad Retirement Act of 1934, 48 Stat. 1283, held unconstitutional in *RR Retirement Board v. Alton R.R.*, 295 U.S. 330 (1935).

(3) The Railroad Retirement Act (1935) 49 Stat. 967 (1935) and

(4) The Carriers' Taxing Act, 49 Stat. 974 (1935), both of which were passed in an effort to overcome the constitutional objection to the Act of 1934, and were supplanted by,

(5) The Railroad Retirement Act of 1937 50 Stat. 307, 45 U.S.C. Section 228a et seq. (1937), and

(6) The Railroad Retirement Tax Act, 50 Stat. 435 (1937), Internal Revenue Code of 1954, Section 3231 et seq.

(7) The Railroad Unemployment Insurance Act 52 Stat. 1094, 45 U.S.C., Section 351 et seq. (1938).

The coverage of these acts is, of course, also broad enough to include other activities peripheral to railroading.

They specifically include, for example, express-companies and sleeping-car companies.

Thus, in the years immediately preceding the 1939 FELA amendment Congress enacted transportation legislation in the major fields of labor relations and social insurance. In all these laws the peripheral activities—including refrigerator car companies—were specifically included. When it came to amendment of the FELA Congress specifically declined to extend it.

Essentially this same argument was raised before the Court of Appeals. It is noteworthy that plaintiff has not commented on it in his opening brief.

The policy reasons for the Congressional reluctance to extend the Act to new industries are well understood and will be set forth in the next session of this brief. The effect, however, of the failure of the proposed extension should be to eliminate any further contention that the peripheral activities—including refrigerator car companies—are covered. The refusal to pass that part of the bill is conclusive that they are not.

### **III. There Are No Policy Considerations Favoring Extension of the FELA to New Industries.**

The deficiencies of a modified negligence statute as a means for compensating railroad work injuries have been well recognized since the passage of the FELA.

Two years after it passed the FELA, Congress established a commission to investigate the subject of employers' liability and workmen's compensation. This Commission became known as the Sutherland Commission. Its findings reflect the unanimous opinion of the United States Senators, representatives and spokesmen for railroad management and labor who constituted the Commission. They recom-

mended the repeal of the FELA and its replacement by a workmen's compensation law, Sen. Doc. No. 338, 62nd Cong., 2d Sess. (1912).

In fact, a compensation act passed both houses of Congress, but not in the same version, and it was allowed to die in the Senate at the end of the session.<sup>5</sup> Efforts to enact workmen's compensation for railroad workers did not stop, however. Bills were introduced in Congress throughout the remainder of that decade. The decade of the 1920's was one of close scrutiny and study of the situation. Commencing in the 1930's Senator Wagner and others introduced many bills to accomplish this purpose. One of *Amici Curiae* is the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as Clerks). This organization is represented as favoring the extension of FELA in this case. It is significant that none of the attorneys for *Amici* makes reference to any resolution or other official action authorizing such a representation. Be that as it may, the public position of the Clerks, and of their long time president, Mr. George M. Harrison, is well known. In December 1934, Mr. Harrison, then Acting Chairman of the Railway Labor Executives' Association, in an article entitled "Railway Labor Favors Federal Accident Compensation Law,"<sup>6</sup> said that though railway labor organizations constantly have taken the lead in pushing labor legislation through Congress, they have a very poor record with respect to getting a federal compensation law to protect the railway employees when injured while working the line of duty. He said: "The fault lies largely with railway employees themselves... There are still some railroad labor organizations that think

5. 62nd Cong. 2d. Sess. S. Bill No. 6121, H.R. Bill No. 20487.

6. 24 Am. Lab. Leg. Rev. 161 (1934).

an injured employee should have the right to make a choice as between compensation and the right to sue, but these organizations are in the minority."

Then, he said, "a very substantial majority of the unions [are] convinced of the advantages of a compensation act," and that for this reason he believed Congress would "enact such a measure without much delay." This is the same Mr. Harrison, of course, whose name is used in the hearings on the 1939 proposed amendment.

At this same time the Clerks' official position was as follows:

"Those who favor retention of the present Federal Employers' Liability Act have been deluded by the ease of securing jury verdicts for large amounts in damages in the lower courts, for a case is hardly ever decided against an employee . . . .

A compensation law would level off some of the big judgments. There is no doubt about that. But it would also remove the gamble railroad employees must now take in securing a big judgment or none at all. Instead of the long chance of winning a jackpot with the dice loaded against them, compensation for injuries and death would be reasonably certain under a Federal compensation law."

As recently as 1946, the proposal for workmen's compensation for railroad workers received important support from Railway Labor.<sup>8</sup>

7. *The Railway Clerk*, official organ of the Brotherhood, Vol. 38, p. 329 (1939).

8. A policy statement of the Railway Labor Executives Association appears in *Labor and Transportation Program and Objectives of Transportation Labor in the Post-War Period* (May 1946): "Railroad labor has advocated and recommended an elective system of benefits for railroad workers to meet the hazards of industrial diseases and railroad accidents. There is no federal system and employees engaged in interstate commerce are not covered by the several states workmen's compensation acts. The establishment of adequate protection should not be further delayed."

One of the reasons for retention of the present Act is that, "vested interests have crystallized around the efforts of railroad workers to secure compensation for their injuries. Representation of claimants is a million dollar business . . ." Pollack, *Workmen's Compensation for Railroad Work Injuries and Diseases*, 36 *Cornell Law Review* 236 at 262. See also, Miller, *The Quest for a Federal Workmen's Compensation Law for Railroad Employees*, 18 *Law and Contemporary Problems* 188 at 192.

The reasons for all the activity on behalf of a compensation act are well understood. Probably the most objective, best informed and most astute analysis of the Act and its administration is the study by the Railroad Retirement Board, "*Work Injuries in the Railroad Industry, 1938—1940 (1947)*". The major author of this work is Jerome Pollack. Mr. Pollack summarized the findings of the study and stated his conclusions in two articles appearing in the early 1950's.<sup>9</sup> Some of the Board's important findings will now be discussed.

Lack of certainty of recovery is a fundamental criticism of the Act.<sup>10</sup> FELA claims are still adjusted and litigated as tort claims. Notwithstanding claims to the contrary, many cases are lost. While there is no adequate statistical evidence showing number of cases lost and claims settled for low

9. Pollack, *Workmen's Compensation for Railroad Work Injuries and Diseases*, 36 *Cornell Law Quarterly*, 236 (1951), Pollack, *The Crisis in Work Injury Compensation On and Off the Railroads*, 18 *Law and Contemporary Problems*, 296 (1953).

10. It is worth noting that in plaintiff's case temporary disability payments were started and have been paid continuously without even an application being filed with the Compensation Board. This same certainty extends to all benefits available under the California Act including medical treatment (California Labor Code, Section 4600) as well as indemnity payments. (A. 6, 7). Permanent disability payments are available on expiration of temporary benefits. Calif. Labor Code § 4658 Thereafter a lifetime pension is available. Calif. Labor Code § 4658

amounts, some indication is given by perusing the appendices to the Opinions of Mr. Justice Douglas in *Wilkinson v. McCarthy*, 336 U.S. 53 at 71 (1948) and *Harris v. Pennsylvania Railroad*, 361 U.S. 15 at 20 (1959).

There are many other deficiencies in addition to lack of certainty of payments. Delay is a major vice. "Nearly half of the more seriously injured employees had to wait more than a half year before they received any payment at all under the liability law. The Railroad Retirement Board's investigation revealed many waited two or three years for any payment."<sup>11</sup>

Lump sum payment rather than the periodic payments which are characteristic of social insurance laws is a major deficiency.<sup>12</sup> Variation in the level of payments for similar injuries is also present. "An exceedingly wide range of payment for each type of disability seriously diminishes the assurance to any worker that he or his survivors will be justly and adequately compensated."<sup>13</sup>

Another deficiency in the FELA is that it does not concern itself with rehabilitation. In fact, its operations are the antithesis of rehabilitation. The Retirement Board's study shows that the proportion of workers who failed to return to work for the employer was negligible if they

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11. Pollack, *Workmen's Compensation for Railroad Work Injuries*, 36 Cornell Law Quarterly 236 at 249. By contrast, for example, the California Workmen's Compensation Act, Labor Code, Section 4650 requires payments to commence after seven days unless the injury necessitates hospitalization or lasts beyond 49 days in which case payment is due from the date of injury.

12. *Ibid*, page 250; a characteristic of Workmen's Compensation is periodic payment. For example, see California Labor Code, Section 4650. In addition, in many jurisdictions the Board administering Workmen's Compensation retains a continuing jurisdiction with power to increase or extend the award. For example, see California Labor Code, Section 5410 providing for an additional award within five years from the date of the injury.

13. *Ibid*, page 247.

did not file suit. In almost half the cases where suit was filed the employee did not get back to work. The study shows that even attorney representation diminished the probability of return to work.<sup>14</sup>

Settlement procedures are a major difficulty of the system. "Most claims are settled by bargaining between the railroad claim agent and the injured employee. Varying claims, offers, counter-claims and counter-offers are made until a settlement is reached. The law itself creates pressures and fosters tactics which degrade this bargaining in a way that was certainly not contemplated by its framers. The results resemble a lottery; settlements vary from exceedingly large to pitifully inadequate amounts."<sup>15</sup>

In summary, Mr. Pollack found at page 269:

"The corporeal and moral health of the Federal Employers' Liability Act was given a thorough check-up by the Railroad Retirement Board. That it was found wanting is hardly debatable. Indeed, any objective appraisal of this Act is bound to sound like a denunciation. The Act failed to meet virtually every criterion of a well-designed and equitable compensation system. When an employee is injured, instead of assuring him that his job and compensation rights will be secured, it places him in conflict with the employer jeopardizing both of these rights. Its most glaring inadequacy is the uncertainty and unpredictability of compensation as it affects both the injured employee and the carrier. It arbitrarily handles injured em-

14. By conspicuous contrast see California Labor Code, Section 139.5 establishing within the Division of Industrial Accidents a rehabilitation unit, including an appropriate professional staff, to foster, review, and approve rehabilitation plans and to expedite and facilitate the carrying out of rehabilitation plans. See also the rehabilitation provisions in the Federal Employees Compensation Act, 63 Stat. 862, 5 U.S.C., Section 8104 (1949) and 80 Stat. 539 (1966) 81 Stat. 210, 5 U.S.C. Section 8111 (1967).

15. Ibid, page 237.

ployees by what amounts to a cruel lottery refusing to pay unlucky employees who have insufficient bargaining power for one reason or another, who may be unfortunate in not having witnesses to support their claims, or who may be simply ignorant of their rights. It permits the employer in some cases to evade responsibility through an obscure and metaphysical claim of non-negligence. In others, it requires the employer to pay several times the actual losses incurred. There is an appalling economic waste in a system which, at the same time that it inadequately compensates most victims of injury, spends disproportionate sums for expenses incidental to litigation."

Outside of the plaintiffs' bar, every major commentator considering the adequacy of the FELA for compensation of work connected injuries has criticized it. Not the least of this criticism has come from this Court. In *Bailey v. Central Vermont Railway*, 319 U.S. 350 (1943), the Court states at 354, "That method of determining the liability of the carriers and of placing on them the costs of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided." See also Mr. Justice Frankfurter's criticism of the Act in *Wilkerson v. McCarthy*, 336 U.S. 53 at 64, 65 (1948).

Moreover, a review of Congressional enactments in the field of compensation for work connected injuries gives persuasive evidence that the Congressional preference is for a workmen's compensation type system.

(1) The same year as the re-enactment of the FELA, 1908, Congress enacted for the government's employees the Federal Employees' Compensation Act, 35 Stat. 556, (1908). This Act has been amended as recently as 1967, 81 Stat. 212,

5 U.S.C., Section 8143 (a) (1967). Within the coverage of this Act are not only Federal Government employees, but also employees of the District of Columbia (Section 8101(1)(D)), members of the Reserve Officers' Training Corps (Section 8140), Peace Corps volunteers (Section 8142), Job Corps enrollees (Section 8143) and members of the National Teachers Corps, (Section 8143a).

(2) It should not be forgotten that in 1912 both houses passed a workmen's compensation act for the railroad industry. However, the houses were unable to get together on a single version.

(3) The Longshoremen's & Harbor Workers Compensation Act, 44 Stat. 1424, 33 U.S.C., Section 901, et seq. (1927).

(4) The Defense Bases Act, 55 Stat. 622, 42 U.S.C., Section 1651, et seq., as amended (1941).

(5) The Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C., Section 1331, et seq., (1953) assimilating (in Section 1333) the Longshoremen's Act.

The Jones Act, 41 Stat. 1007, 46 U.S.C., Section 688 (1920) extending to merchant seamen the provisions of the FELA, is the lone exception to this uniform trend of Congressional legislation. At the time of its enactment seamen had traditionally been entitled to maintenance and cure—in effect a limited form of workmen's compensation, and to libel in admiralty for unseaworthiness—a form of liability not subject to the traditional common law defenses. Whatever the reasons for the Jones Act, seven years later Congress passed the Longshoremen's & Harbor Workers' Compensation Act 44 Stat. 1424, 33 U.S.C. section 901 (1927). This Act was passed six months after Mr. Justice Holmes' opinion and the judgment of this Court holding longshoremen entitled to maintain actions under the Jones Act. *International Stevedoring Company v. Haverty*, 272 U.S. 50 (1926). Thus,

Congress well knew that without any further action on its part men employed as longshoremen would have the remedy of the modified negligence statute. Instead Congress chose [in favor of] a compensation scheme for longshoremen—an occupation closely related to merchant seafaring and an integral part of the interstate transportation process.

Furthermore, two federally owned railroads, The Panama Railroad Co.<sup>16</sup> and The Alaska Railroad,<sup>17</sup> were included within the Federal Employees' Compensation Act, thus indicating Congressional approval of a compensation scheme for railroad employees.

Nor can it be said that Congress prefers only *federal* workmen's compensation systems for those engaged in transportation. Thus, by an absence of legislation Congress has left the adjustment of work injuries on interstate truck-lines, airlines and buslines to the various state workmen's compensation systems.

The foregoing review and listing indicates both by frequency and recent enactment the Congressional preference for workmen's compensation as a means of adjusting the burdens of work connected injury.

Plaintiff and Amici argue that workmen (including plaintiff) who are exposed to "railroad hazards" should be subject to FELA. Plaintiff takes the matter one step further and urges a "primary duty" test—i.e., "if the primary duty is railroading, then the FELA applies." (Brief, p. 26).

Heretofore General Electric Co.,<sup>18</sup> Ford Motor Co.,<sup>19</sup>

16. 39 Stat. 750 (1916).

17. Formerly 5 U.S.C., Section 792. See 80 Stat. 553, 5 U.S.C. § 8146 (1966)

18. *Kelly v. General Electric Co.*, 110 F.Supp. 4 (E.D. Pa 1953) *affd.* 204 F.2d 692 (3rd Cir.) *cert. den'd.* 346 U.S. 886.

19. *Tilson v. Ford Motor Company*, 130 F.Supp. 676 (E.D. Mich. 1955).

and Armco Steel Corp.<sup>20</sup> have been held not subject to the FELA. From the standpoint of exposure to risks, however, their situation—or the situation of any large user of rail service—cannot be distinguished from the facts shown in this case. Thus in *Kelly v. General Electric Co.*, (supra), plaintiff was run down by a switching engine owned and operated by the defendant. As part of its plant equipment General Electric “has a system of internal trackage some 2.17 miles in length, 2 switching engines used in moving cars within the confines of the plant, 9 specially constructed cars which it rents to rail carriers . . . and 10 other cars used for the housing and exhibition of defendant’s products . . . Cars are delivered by the Pennsylvania Railroad to the said siding and thereafter distributed throughout the plant by the switching engines of the defendant.” (P.5). In *Tilson v. Ford Motor Co.*, (supra), decedent was employed as a brakeman in defendant’s railroad yard located within its Rouge Plant area. (P. 676). Operations were not only conducted within the plant but also occasionally sand was hauled from a sand gantry one half mile away. (P. 678). In *Duffy v. Armco.*, (supra), decedent was a brakeman on one of Armco’s train crews. Armco “owns and operates railroad equipment within its manufacturing plant . . . This equipment is used to transport material and equipment from one place to another within the plant and to other plants of the defendant located in the same area over leased rights of way.” (P. 738).

Under plaintiff’s theory of the case, workers in the foregoing situations will be covered by the FELA. The range of industries potentially subject is a broad one. It includes not only such large industrial users of rail service

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20. *Duffy v. Armco Steel Corporation*, 225 F.Supp. 737 (W.D. Pa. 1964).

but also the private car lines<sup>21</sup> and the suppliers of rail-equipment.

Moreover, under *Reed v. Pennsylvania R.R.*, 351 U.S. 502 (1955) not just those employees exposed to rail hazards but—in a company which is subject to the Act—any employee any part of whose duties furthers or substantially affects interstate commerce would be covered. Thus, combining plaintiff's tests with *Reed*, in any given concern if there is an employee injured in connection with rail equipment or who regularly worked around rail equipment, he will be able to maintain suit under the FELA and thereafter presumably all employees of that firm will be subject.<sup>22</sup>

Alternatively, if not all employees are to be covered, then no matter what it is called, one is reduced to some "test" for determining coverage. Whether it is a test of "exposure to hazards," "primary duty" or "moment of injury," the results will be the same—to create invidious and unjustifiable distinctions among workers as to the treatment of their work connected injuries.

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21. A current issue of The Official Railway Equipment Register lists alphabetically 12 pages in double column of Railroad and private car owners. See The Official Railway Equipment Register, Vol. LXXXII No. 4, April 1967, I.C.C. R.E.R. No. 363.

22. This is apparently exactly the situation now faced by Lone Star Steel Co. See *Lone Star Steel Co. v. McGee*, 380 F.2d 640 (5th Cir. 1967), cert. den'd. — U.S. — (1967). Lone Star has substantial rail facility—"a complex system of rail trackage covering several miles . . . owned 8 diesel electric locomotives, 94 cars of railroad rolling stock, and 6 railroad cranes . . . had 57 employees performing duties in connection with its rail facilities." (P. 642) The case stands on its own, however, and is readily factually distinguishable from PFE's situation in that Lone Star was performing the physical movement of goods from place to place for various industries and contractors within its plant complex. (pp. 642, 643). This fact is instrumental in the court's holding that Lone Star is a common carrier by rail. Also, there is no statutory history which suggests an intention to exclude one in Lone Star's situation, as there is in the case of companies peripheral to railroading.

Either way—complete coverage of new industries or selective coverage—if this case be reversed the potential increase in numbers of people subject to FELA is significant and extends far beyond the employees of PFE. This represents a significant breach in the coverage of workmen's compensation and a reversal of the accepted norm for the adjustment of burdens of work connected injuries.

Whatever the merits of a modified negligence statute in 1908, the special status of railroad employees as subject to the FELA is an outmoded concept of the law. "There appears to be no longer any good reason for singling out railroad workers and placing them in a special (privileged or underprivileged, depending on the side of the controversy we are on) group."<sup>23</sup> Still less is it good policy to extend the outmoded concept to new groups of workers.

#### **IV. The Facts of This Case Establish as a Matter of Law That Pacific Fruit Express Is Not a "Common Carrier by Railroad".**

It is inapposite that a correct version of the facts should have to be argued to this Court. The basic underlying facts are indeed, not in dispute. Certain of plaintiff's conclusions or labels drawn from the underlying factual data, however, are so erroneous they require analysis and answer. An example of these misleading statements is found in a portion of Plaintiff's Brief appearing on page 26 as follows:

"Petitioner was employed in a railroad yard where movement of rail cars was occurring, where car maintenance, loading and unloading were taking place, where the interstate transportation of perishable commodities by rail was being effectuated."

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23. Parker, FELA or Uniform Compensation for All Workers, 18 Law and Contemporary Problems, 208 at page 213.

To state that someone is employed in a "railroad yard" where movement of cars is occurring is to imply the typical activity of an operating rail terminal, that is, the making up and breaking up of trains, the classification and assembly of cuts of cars, the provision of service to local industry, and so on. Clearly no such thing is happening in this case. The record does not establish the extent or layout of trackage owned by PFE, but the record does establish that PFE owns only shop tracks and loading tracks. (A.21) It requires a considerable exercise of imagination to construe such facilities as a "railroad yard." To further imply that "movement of cars" is a principal activity in the area leaves a completely misleading picture. Also, there is nothing in this record or in any prior refrigerator car company decision which in any way indicates PFE or any refrigerator car company performs any service in loading or unloading commodities in cars. This entire paragraph is completely without reference to pages of the Appendix or any other source and is completely unsupported by the descriptions of PFE's activities in the affidavit (A.18) and company literature. (A.41)

Another favorite assertion is that PFE controls the movement of cars. (Brief p. 3). The factual basis for this is that tariffs filed by rail common carriers with the Interstate Commerce Commission grant shippers the privilege of diversion or reconsignment in transit.<sup>24</sup> This privilege is an incident of the relationship between the shipper and the railroad. On some occasions a shipper desiring to order diversion calls PFE. PFE, by clerical forces in Chicago, (A.49) using telephones and telegraphs (A.49) communicates the shipper's desire to the railroad. Out of this simple story plaintiff fashions the assertion that PFE controls

24. See Reconsignment Case 47ICC590 (1917). *Central Commercial Co. v. Louisville & Nashville R.R. Co.*, 27 I.C.C. 114, 115 (1913).

the car. Plainly the decision to divert does not originate with PFE and the act itself is not performed by PFE; PFE would not have the right on its own to order any particular handling of the car; and PFE has no physical custody of or contact with the car. It acts on some occasions as a conduit between shipper and carrier. It is difficult to see how such a role can justify plaintiff's assertions.<sup>25</sup> Further, the providing of passing service information (again, by clerical personnel using the telephone) (A.49) hardly seems to be exercising control over the car.

Plaintiff asserts that PFE holds itself out to the public as *providing common carriage of perishable commodities by rail*. (Brief, p. 3). The only factual basis for such an assertion is plaintiff's enumeration of various classified telephone directories where PFE appears under the headings of "Railroads" and "Railroad Companies." (Brief, p. 10) This is not only a bald effort to present extra-record material. It is also a shocking jump in logic. Plaintiff could have completed the job of improperly supplementing the record by reproducing the text of the various telephone book advertisements so the Court could judge for itself whether there was a holding out to provide transportation. Instead of doing so one is asked to infer the substance of the "holding out" from the category under which the telephone company placed the ad. One is compelled to ask, who is doing the holding out—the phone company or the advertiser?

Plaintiff is fond of asserting that PFE owns "terminal and service properties and facilities." (Brief, p. 11) This is

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25. A good indication that this is not a new or unusual feature of the refrigerator car company business is the description of it in the photostatic copy of the article from Business Week of December 9, 1939, attached as an appendix to petitioner's brief. Thus, this attempt to inject new facts at this final appellate stage discloses matters which are not new and which have little bearing on the fundamental aspects of the refrigerator car company business.

completely misleading to anyone who understands these words in their accepted sense. In connection with railroads, terminals mean large yards where trains are made up and broken up, where there is a great deal of switching, and from which local industries are served. Patently, PFE owns no such areas and conducts no such operations. On the other hand, the ownership of intraplant trackage and the operation of it by a switch engine for one's own business purposes has never been thought to make one a common carrier by railroad, or to render the trackage located on his premises a "terminal." See cases cited in footnotes 18, 19 and 20.

One can only peruse plaintiff's inapt characterizations and come away with the impression that they are unimportant to the decision of the case. The essential features of the operations of a refrigerator car company are well understood. They are: (1) to own and lease refrigerator railroad cars and (2) to provide protective services (e.g., icing) to such cars. (A.18) It is impossible to believe that providing a telephone service for the transmission of car diversion orders or publishing a brochure advertising the advantages of your car fleet (A 37-40) can be anything more than details of the operation. The same can be said for statistics on car miles or operating revenues, or the number of ice plants any given company operates.

Given an understanding of the activities of refrigerator car companies it is proper to make some analysis of the authorities offered by plaintiff.

Plaintiff places main reliance on the so-called terminal company cases. Great stress is placed on *Parden v. Terminal R. of Alabama*, 377 U.S. 184 (1964). Any fair reading of this Court's Opinion discloses that it had to do with the constitutional immunity of the State of Alabama, not with what constitutes a common carrier for FELA purposes. It

is, however, instructive to compare PFE's operations with this Court's preliminary description of the operations of the Terminal Railroad of Alabama. The Court states:

"Consisting of about 50 miles of railroad tracks in the area adjacent to the State Docks at Mobile, it serves those docks and several industries situated in the vicinity, and also operates an interchange railroad with several privately owned railroad companies."

This is the crux of the matter. The terminal railroad had an operating railroad. It used this railroad to perform a *transportation service for others*—e.g., customers with inbound and outbound shipments at the docks, the various industries located on its line and common carriers with whom it had connections. PFE—and refrigerator car companies—perform no such service. PFE does not switch for any industries—either for profit or otherwise. PFE does not perform an interchange service for railroads. PFE does not, with its own locomotive power and crews, spot cars and make pick ups—i.e., perform the physical operations of switching service—at any docks or for any industrial customers. (A. 18-23). This is not only an immediately apparent factual difference in the two types of operations, it is the most fundamental possible difference. The performance of an industrial switching service and an interchange service constitutes the very heart of any terminal railroad's business.

Without belaboring the point it must be apparent the two situations are factually distinguishable on an essential point. The terminal company cases, to the extent they constitute a line of authority under the FELA, are not a good analogy for the refrigerator car industry. The same must be said for *U.S. v. Brooklyn Terminal*, 249 U.S. 296 (1919), relied on by plaintiff. In the first place this is a decision

under the Hours of Service Act, an Act with a different statutory history (particularly in regard to the 1939 amendment) than the FELA. More importantly, the defendant "operates a union freight station. From the railroads it receives . . . freight and transports the same . . . to its Brooklyn docks. There, the cars . . . are hauled from the car floats by its locomotives and placed for unloading . . . The Terminal receives likewise from shippers . . . outgoing freight." (P. 301). The Brooklyn Terminal Company was performing physical and operational transportation for others—a service which refrigerator car companies do not perform.

In *Union Stock Yard Co. v. U.S.*, 308 U.S. 213 (1939) the question was coverage of the Interstate Commerce Act, an Act with a vastly different purpose and statutory history than the FELA. This Court noted that Section 15 (5) of the Act as it then existed specifically included all necessary service of unloading and reloading of livestock, the service which Union Stock Yard performed. Moreover, the Court found "appellant's stockyard is a terminal of the line haul carriers, and that it performs their railroad terminal services" within the Act as construed. (P. 219). This Court distinguished *Ellis v. Interstate Commerce Comm'n*, 237 U.S. 434 (1915), which held refrigerator car companies were not within the coverage of the Interstate Commerce Act. Because there is no question here of PFE performing any loading or unloading function or any terminal services, and because of the different purposes and statutory history of the Interstate Commerce Act and the FELA, the cases must be distinguished.

Plaintiff also relies on *Fort Street Union Depot v. Hillen*, 119 F.2d 307 (6th Cir. 1941). This case at least is a clear cut FELA holding. Here the terminal railroad "makes up and breaks up trains . . . switching them within the depot yards and transferring freight, express and baggage . . ."

(P. 309, 310) This, of course, is exactly what PFE does not do, and the case thus is not good authority for characterization of the refrigerator car industry.

### CONCLUSION

#### **This Case Was Properly Resolved by Summary Judgment.**

Questions as to which industries come within the scope of coverage of the FELA and are "common carriers by railroad" should be questions of law to be decided by the courts and not juries. If scope of coverage in this context is to be left to the fact finder the Act will become extremely difficult to administer because there will be uncertainty in the minds of both employer and employee as to whether the applicable law is FELA or a workmen's compensation statute until the question is resolved by a fact finder. The resolution under such circumstances could be different in each case. The normal results of such a situation would be more litigation, fewer settlements, increased delay in payment of benefits and increased expense of administration of the Act and workmen's compensation acts.

Both plaintiff and Amici contend that the Act should be liberally construed so as to bring the respondent within its coverage. In support of this they claim this Court has been liberal in the past in its treatment of this Act. The liberal construction of the Act by this Court has been on questions of fact, securing a jury trial and proximate cause, for those who were admittedly subject to the Act. This liberal construction has been necessitated by the fact that the Act is grossly inadequate to the needs of railroad employees involved in work injuries. See Mr. Justice Frankfurter's concurring opinion in *Wilkerson v. McCarthy*, 336 U.S. 53 at pages 65-66 (1948).

"These observations are especially pertinent to suits under the Federal Employers' Liability Act. The diffi-

culties in these cases derive largely from the outmoded concept of 'negligence' as a working principle for the adjustments of injuries inevitable under the technological circumstances of modern industry. This cruel and wasteful mode of dealing with industrial injuries has long been displaced in industry generally by the insurance principle that underlies workmen's compensation laws. For reasons that hardly reflect due regard for the interests of railroad employees, 'negligence' remains the basis of liability for injuries to them. It is, of course, the duty of courts to enforce the Federal Employers' Liability Act, however outmoded and unjust in operation it may be. But so long as negligence rather than workmen's compensation is the basis of recovery, just so long will suits under the Federal Employers' Liability Act lead to conflicting opinions about 'fault' and 'proximate cause.' The law reports are full of unedifying proof of these conflicting views, and that too by judges who seek conscientiously to perform their duty by neither leaving everything to a jury nor, on the other hand, turning the Federal Employers' Liability Act into a workmen's compensation law."

Beyond what has been stated this Court has not had a liberal policy of extending the Act to new areas already covered by more desirable laws of workmen's compensation.

The judgment of the lower court should be affirmed.

Dated, San Francisco, California, January 29, 1968.

Respectfully submitted,

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